Jurisdictional Statement

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 81 5100

DAVID MICHAEL BARNETT,

Appellant

VS.

STATE OF TEXAS,

Appellee

APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

DON GLADDEN

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July 21, 1981

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NO.

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VS.

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APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on April 22, 1981, affirming Appellant's probation revocation for resisting arrest.

OPINIONS BELOW

The judgment and opinion of the Texas Court of Criminal Appeals is reported at 615 S.W.2d 220 and is set forth in full in Appendix A.

JURISDICTION

This action is brought by the Appellant to challenge the constitutionality of Section 38.03 of the Texas Penal Code, and to reverse the judgment of his probation revocation based upon this statute. Revocation of Appellant's probation in the Criminal District Court Number Three, Tarrant County, Texas, was entered on August 5, 1980, and punishment was set at five years in the Texas Department of Corrections. Notice of Appeal to the Texas Court of Criminal Appeals was timely given and on April 22, 1981, that Court affirmed the decision of the Trial Court. Thereafter, Notice of Appeal to the United States Supreme Court was filed in the Texas Court of Criminal Appeals on July 20, 1981.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1257(2).

QUESTION PRESENTED

1. Is Section 38.03 of the Penal Code of the State of Texas contrary to, and violative of rights protected and guaranteed under the Fourth and Fourteenth Amendments to the Constitution of the United States, that is, can the State of Texas make it a criminal offense to resist law enforcement officers who are attempting to arrest a person without probable cause or reason to believe that that person has been guilty of an offense under state law?

STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved are as follows:

a. The Fourth Amendment to the United States Constitution which provides in relevant part as follows:

> "The right of the people to be secure in their persons...against unreasonable...seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing...the persons...to be seized."

b. The Fourteenth Amendment to the United States Constitution which provides in relevant part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

c. Article 38.03 of the Texas Penal Code, in effect at the time Appellant was tried, provides in relevant part as follows:

> "§38.03 Resisting Arrest or Search
>
> (a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.
>
> (b) It is no defense to prosecution under this section that the arrest or search was unlawful."

d. Article 42.01(a)(1) of the Texas Penal Code provides in relevant part as follows:

> "§42.01 Disorderly Conduct
>
> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;...."

STATEMENT OF THE CASE

A. Preservation of Constitutional Questions Below

Appellant attempted in the Trial Court to develop that a police officer who stopped him did so without either probable cause or reason to believe that he had committed an offense. The Trial Court sustained the State's objections to Appellant's effort to address this question.

Appellant again raised the question of probable cause or reasonable belief in the Texas Court of Criminal Appeals and the Court of Criminal Appeals passed upon these questions as follows:

> "He [Appellant] maintains that there is insufficient evidence to prove that [Officer] Panke believed

appellant's arrest to be lawful or that he had probable cause for an arrest.

V.T.C.A. Penal Code, Sec. 38.03(a) and (b), provide as follows:

> '(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.
>
> '(b) It is no defense to prosecution under this section that the arrest or search was unlawful.'

In Gonzales v. State, 574 S.W.2d 135, this Court held that in view of Sec. 38.03, supra, it is now a criminal offense to resist an officer even though he may be making an unlawful arrest. See Guevara v. State, 585 S.W.2d 744. We therefore need not decide the legality of Panke's actions. Even if the arrest was unlawful, appellant's actions nevertheless constituted resisting arrest. Gonzales v. State, supra. These contentions are without merit." (Emphasis ours) See p. 3 Appendix A.

* * * * *

"Finally, appellant challenges the constitutionality of Sec. 38.03, supra. He maintains the statute 'chills the free exercise' of rights protected under the Fourth and Fourteenth Amendments to the United States Constitution.

A similar challenge to the statute was rejected by this Court in Ford v. State, 538 S.W.2d 633, when we stated:

> 'Several states have eliminated either by statute or by judicial decision the common law right to resist an unlawful arrest. This reflects a growing realization that the use of self-help to prevent an unlawful arrest presents too great a threat to the safety of individuals and society to be sanctioned. The line between an illegal and legal arrest is too fine to be determined in a street confrontation; it is a question to be decided by the courts. By limiting the common law right to resist an unlawful arrest, the Legislature has not limited the remedies available to the person arrested. He or she may still take advantage of the right to bond, to appointed counsel if indigent, to prompt arraignment and determination of probable cause, to the exclusionary rule and to civil remedies against the offending policeman. The State has not increased the deprivation of liberty suffered upon arrest by the abolition of the common law right to resist an unlawful arrest. We hold that Section 38.03, supra, is a valid exercise of the police power and does not violate the United States or Texas Constitution.' Id. at 635.

We adhere to our holding in Ford and thus reject appellant's challenge to the statute." See p. 5 Appendix A.

B. Facts

This is a criminal prosecution against the Appellant, David Michael Barnett. Appellant was originally convicted of delivery of a controlled substance on March 6, 1978, and was assessed a five-year sentence probated for a period of five years.

On May 2, 1980, Appellant and his infant son were passengers in a motor vehicle operated by his wife. Appellant shouted an obscenity to an Arlington police officer addressing the manner in which the police officer had been operating his motor vehicle which, in the opinion of the Appellant, endangered the well-being of himself and his family.

Upon hearing the obscenity the Arlington police officer pursued the Appellant and upon stopping and confronting him other obscenities are alleged to have been spoken. Appellant was told he was under arrest for "disorderly conduct" (no charges were ever lodged against Appellant for this offense, however). Some force was used in arresting Appellant. The Appellant and his wife were both subsequently charged with the offense of "resisting arrest and search."[1]

Following the arrest and charging of Appellant for "resisting arrest and search," an application by the State was, on July 8, 1980, filed to revoke the Appellant's probation alleging that he had violated the terms of probation by committing the offense of "'resisting arrest and search' and 'assault with bodily injury.'" After a hearing the Trial Court revoked Appellant's probation and he is currently serving his five-year sentence in the Texas Department of Corrections.

---

[1]Although the record in this case does not reflect disposition of these charges Appellant was found not guilty by a jury in Cause No. 155726 in County Criminal Court No. 4 of Tarrant County, Texas. Charges against his wife in Cause No. 155727 in the same Court were subsequently dismissed by the State.

At the hearing in which Appellant's probation was revoked and he was ordered to serve his sentence, he sought to establish that his conduct did not rise to that level of speech which is or may be limited or prohibited by a State (see Article 42.01 (a)(1), Texas Penal Code) and thus there was no basis for his initial arrest. Both the Trial Court and the Court of Criminal Appeals ruled that it was neither appropriate or necessary to decide the question of "lawful stop" or "lawful arrest" relying on Article 38.03(b) of the Texas Penal Code which reads as follows:

"§38.03 Resisting Arrest or Search

(b) It is no defense to prosecution under this section that the arrest or search was unlawful."

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has consistently and firmly held that one of the most precious rights afforded individuals in the United States is a right protected by the Fourth Amendment against unlawful searches and seizures and has addressed the circumstances and conditions as to when an individual's right to personal security is abrogated in favor of law enforcement officers' right to interfere with the liberty of citizens. See Dunaway v. New York, 442 U.S. 200, United States v. Brignoni-Ponce, 442 U.S. 873, Delaware v. Prouse, 440 U.S. 648, Brown v. Texas, 443 U.S. 47.

The question in this case does not involve a "stop" as addressed first in Terry v. Ohio, 392 U.S. 1, and more recently in Brown v. Texas, supra, but rather the circumstances of an actual "arrest."

This Court has directed that an arrest without a warrant must be predicated upon "probable cause." Beck v. Ohio, 379 U.S. 89. The question in this case is whether or not a State may impose criminal penalties on a citizen who chooses to exercise his right protected and guaranteed by the Fourth Amendment to

the Constitution of the United States by resisting an unlawful effort (based neither on "probable cause" nor even "reasonable belief") to restrict, limit, or deny those rights guaranteed and protected by the Fourth Amendment to the Constitution of the United States. This question is of substantiality in that if the States are allowed to, without regard to the rights of citizens, make it a penal offense to exercise rights guaranteed by the Constitution those rights become meaningless in the context of a free society.

CONCLUSION[2]

This appeal raises an issue of fundamental importance to our system of criminal justice. The Court has not directly considered this question. In light of the recent cases in this Court delineating the circumstances where a "stop" or an "arrest" may be made by law enforcement officers, the Court should now consider the circumstances and degree to which a citizen may exercise his rights under the Fourth Amendment without the fear or certainty of criminal prosecution for such exercise.

Respectfully submitted,

LAW OFFICES OF DON GLADDEN
2814 Avenue D
Fort Worth, Texas 76105
(817) 531-3667

By:
DON GLADDEN

ATTORNEY FOR APPELLANT

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[2]In the event this Court feels this appeal has been improvidently filed, Appellant requests that the Court grant a Writ of Certiorari to the Texas Court of Criminal Appeals to review this matter.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Statement was delivered to Appellee by mailing a copy of same to Mr. Mark White, Attorney General for the State of Texas, at the Supreme Court Building, Austin, Texas, and Mr. Tim Curry, Criminal District Attorney for the County of Tarrant, State of Texas, at the Criminal Courts Building, Fort Worth, Texas, on this 21st day of July, 1981.

DON GLADDEN

DAVID MICHAEL BARNETT, Appellant

NO. 66,941 v. - - - Appeal from TARRANT County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appeal is taken from an order revoking probation.

On March 6, 1978, in a trial before the court, appellant was convicted upon his plea of guilty for delivery of a controlled substance, namely: methamphetamine. Punishment was assessed at five years, probated. On August 5, 1980, appellant's probation was revoked after the court found that he had violated the conditions of his probation by committing the offenses of resisting arrest and assault on May 2, 1980.

In three related contentions, appellant contends the court abused its discretion in revoking his probation. He maintains the evidence is insufficient to prove that he resisted arrest or assaulted the complainant. Appellant further uges that any bodily contact he had with the complainant was the result of self-defense.

Officer R. W. Panke, of the Arlington Police Department, testified that on the night of May 2, 1980, he was in uniform and on patrol in a marked squad car. Panke observed two vehicles racing and was forced to make a u-turn in order to pursue them. After stopping one of the vehicles, Panke saw appellant hanging out the passenger side of a moving car. As the car passed Panke, appellant screamed obscenities at the officer. Following this incident, Panke reentered his squad car and pursued the car occupied by appellant.

After stopping the car in which appellant was a passenger, Panke approached the car and appellant screamed another obscene phrase. At this time, appellant was told that he was under arrest for disorderly conduct and ordered out of the car. Panke related

that appellant refused to leave the car and that he had to be physically removed. Once out of the car, appellant struggled with Panke and was eventually subdued and handcuffed. As Panke was placing appellant in the squad car, he was kicked in the face, chest, shoulder and groin area. Panke testified that he suffered pain and bruises as a result of appellant kicking him.

Appellant's wife, Terri Barnett, testified that she was the driver of the car in which her husband was a passenger when he was arrested. She stated that appellant did not resist arrest, nor did he kick the officer. Lastly, she related that Panke was acting like a "maniac."

Appellant testified that he had screamed at Panke because the officer's actions in making a u-turn had almost caused his wife to have a collision. Appellant denied resisting arrest or attempting to injure Panke. Lastly, appellant stated that he did not kick the officer.

Betty McKay testified that she saw Panke "being rough" with appellant. She related that she did not observe appellant resisting Panke or kicking him.

In a probation revocation proceeding the trial court is the sole trier of the facts. Battle v. State, 571 S.W.2d 20. Appellate review of an order revoking probation is limited to the issue of whether the court abused its discretion. Flournoy v. State, 589 S.W.2d 705. Finally, the standard of proof in such a proceeding is proof by a preponderance of the evidence. Bradley v. State, 564 S.W.2d 727.

There was conflicting evidence with regard to appellant's actions toward Panke. The court in its role as trier of the facts chose to believe the events as related by Panke. The evidence thus supports the court's finding of resisting arrest and an assault. Appellant's contentions based upon the conflicting evidence presented at the hearing are without merit.

In two related contentions, appellant contends the court abused its discretion in revoking his probation. He maintains that there is insufficient evidence to prove that Panke believed appellant's arrest to be lawful or that he had probable cause for an arrest.

V.T.C.A. Penal Code, Sec. 38.03(a) and (b), provide as follows:

> "(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.
>
> "(b) It is no defense to prosecution under this section that the arrest or search was unlawful."

In Gonzalez v. State, 574 S.W.2d 135, this Court held that in view of Sec. 38.03, supra, it is now a criminal offense to resist an officer even though he may be making an unlawful arrest. See Guevara v. State, 585 S.W.2d 744. We therefore need not decide the legality of Panke's actions. Even if the arrest was unlawful, appellant's actions nevertheless constituted resisting arrest. Gonzales v. State, supra. These contentions are without merit.

Appellant further contends the court abused its discretion in revoking his probation. He maintains the court unduly restricted his right to cross-examine Panke as to the basis of probable cause or reasonable belief that appellant had committed an offense.

The record reflects that in appellant's cross-examination of Panke, the following occurred:

> "Q. Did you tell him what he had done, the basis upon which you were arresting him?
>
> "A. I just advised him he was under arrest for disorderly conduct.

"Q. And that was, in your opinion, yelling obscenities in public?

"A. Right.

"Q. Did he incite in so doing any immediate breach of the peace of anything?

"A. Disorderly conduct.

"Q. When he did it was somebody other than you incited to the point that he breached the peace?

"MR. BORG: Your Honor, I object to that. We renew our original objection. Secondly, this asks for this officer to go into the mental processes of some other witness that may or may not have been at the scene.

"THE COURT: I'll sustain that."

During argument before the court, appellant's counsel stated as follows:

"MR. GLADDEN: . . . I suggest to the Court that since we didn't get to go into the effect of what his hollering had that this Court probably should not consider whether it was a proper arrest or not a proper arrest, but rather transacted there at the scene, so I would object to the Court looking at or considering the screaming or what effect the screaming had out there as to whether or not it constituted a defense because we didn't get to develop whether it constituted a defense or not.

"THE COURT: Are you asking me to reopen? The Court doesn't agree with you about cutting you off. I don't think this Court has cut you off in any fashion but if I have, and you insist that I have, I will let you reopen?"

Appellant did not choose to reopen the case in order to offer the excluded testimony. Nor does the record contain a bill of exception as to the excluded testimony.

When a defendant contends that his cross-examination of a witness has been unduly limited, nothing is preserved for review unless the record shows by bill of exception or otherwise what questions he wanted to propound and the answers he expected therefrom. Toler v. State, 546 S.W.2d 290; Calverley v. State, 511 S.W.2d 60. We conclude that appellant has failed to preserve the alleged error for review.

Finally, appellant challenges the constitutionality of Sec. 38.03, supra. He maintains the statute "chills the free exercise" of rights protected under the Fourth and Fourteenth Amendments to the United States Constitution.

A similar challenge to the statute was rejected by this Court in Ford v. State, 538 S.W.2d 633, when we stated:

> "Several states have eliminated either by statute or by judicial decision the common law right to resist an unlawful arrest. This reflects a growing realization that the use of self-help to prevent an unlawful arrest presents too great a threat to the safety of individuals and society to be sanctioned. The line between an illegal and legal arrest is too fine to be determined in a street confrontation; it is a question to be decided by the courts. By limiting the common law right to resist an unlawful arrest, the Legislature has not limited the remedies available to the person arrested. He or she may still take advantage of the right to bond, to appointed counsel if indigent, to prompt arraignment and determination of probable cause, to the exclusionary rule and to civil remedies against the offending policeman. The State has not increased the deprivation of liberty suffered upon arrest by the abolition of the common law right to resist an unlawful arrest. We hold that Section 38.03, supra, is a valid exercise of the police power and does not violate the United States or Texas Constitution." Id. at 635.

We adhere to our holding in Ford and thus reject appellant's challenge to the statute.

No abuse of discretion is shown in the revocation of appellant's probation.

The judgment is affirmed.

TOM G. DAVIS, Judge

(Delivered April 22, 1981)

By: Panel 3, 1st Quarter, 1981, composed of:

Tom G. Davis, Judge
Michael J. McCormick, Judge
Marvin O. Teague, Judge

560R
-1513

IE STATE OF TEXAS

S.

AVID MICHAEL BARNETT

NO. 11933

IN THE CRIMINAL DISTRICT COURT THREE OF TARRANT COUNTY, TEXAS

ORDER REVOKING PROBATION

ate of Entry of this Order	:	August 5, 1980
efendant	:	David Michael Barnett
dge Presiding	:	Hon. Randell C. Riley
ttorney for State (1)	:	Criminal District Attorney Tim Curry - Pam Moore
ttorney for Defendant	:	Hon. Don Gladden
ate of Probation Order	:	March 6, 1978
ransfer (2)	:	None
uration of Probationary Period	:	Five (5) Years
ate of Violation	:	May 2, 1980
riginal Term of Imprisonment Assessed (3)	:	~~XXXXXXXXX~~ ~~YXXXXXXXXXXXXX~~ -5- Years
eduction of Imprisonment Allowed by Court (4)	:	None
erm of Imprisonment	:	Not Less Than --5-- Years nor More Than --5-- Years
aragraph of Probation Order Alleged Violated (5)	:	Paragraph One & Paragraph Two
rounds for Revocation (6)	:	On May 2, 1980 the defendant committed new offenses, To-Wit: Resisting Arrest and Assault with Bodily Injury, as set out in the State's Petition for Revocation of Probated Sentence.

Best Copy Available

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On this day, set forth above, the Motion of the State to Revoke Probation in this cause came on fo. hearing; came the State of Texas, by its above named attorney, and the Defendant appeared in person and by the above named attorney for Defendant, and announced ready for hearing, the Defendant having been heretofore served with a copy of the Motion to Revoke Probation alleging violations of paragraphs of the probation order of the Court as set forth above and filed herein; and the Court after considering the pleadings, and hearing the evidence offered by both the State and the Defendant and the arguments of counsel, being of the opinion and finding that since the time Defendant was placed on probation herein and within the term of the probationary period set by the Court, Defendant has violated the terms and conditions of such probation in the manner set forth above as Grounds for Revocation, and that said probation should be revoked;

And, when shown above that a reduction of imprisonment has been allowed by the Court, the Court determined that the best interests of society and the probationer would be served by such shorter term of imprisonment and so reduced the term of imprisonment originally assessed;

It is therefore CONSIDERED by the Court that the Defendant be, and is hereby, adjudged to have violated the terms and conditions of probation in this cause in the manner set forth above, and that the Order Suspending the Imposition of Sentence and Placing Defendant on Probation heretofore entered in this cause be, and the same is hereby, REVOKED, and it is hereby ORDERED by the Court that the Defendant be now sentenced herein, in accordance with the Judgment heretofore entered in this cause and in compliance

(1) Show name and title of prosecutor.
(2) Show "None" or show cause number, district court and county from which transferred.
(3) Obtain Punishment from original judgment placing defendant on probation and convert to indeterminate sentence.

NO. 11933

THE STATE OF TEXAS	§	IN THE CRIMINAL DISTRICT
VS.	§	COURT NUMBER THREE
DAVID MICHAEL BARNETT	§	TARRANT COUNTY, TEXAS

PETITION FOR REVOCATION OF PROBATED SENTENCE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and Through Tim Curry, Criminal District Attorney of Tarrant County, Texas, and would respectfully show the Court that DAVID MICHAEL BARNETT hereinafter styled Defendant, was heretofore on MARCH 6, 1978 adjudged guilty in this cause and was on MARCH 6, 1978 assessed a FIVE (5) year sentence for the offense of DELIVERY OF METHAMPHETAMINE; said Court at such time pronounced Judgment herein; but suspended the imposition of the sentence and placed the Defendant on probation upon the terms and conditions as set out in the Judgment herein, the suspension of imposition of said sentence and placing the Defendant on probation was in all things conditioned upon the Defendant's obeying and abiding by each and all of said terms of probation.

Your petitioner would show to the Court that said Defendant thereafter, during the effective period of said probation, violated the terms and conditions of said probation in that he:

(1) The defendant, David Michael Barnett, was ordered by the Court to commit no offense against the laws of this State or any other State or the United States. The defendant, David Michael Barnett, in the County of Tarrant and State of Texas, on or about the 2nd day of May, 1980, did then and there intentionally prevent and obstruct R. W. Panke, a person he knew to be a peace officer, from effecting an arrest and search of David Michael Barnett, by using force against said peace officer, to-wit: kicking, Against the Peace and Dignity of the State.

(2) The defendant, David Michael Barnett, was ordered by the Court to commit no offense against the laws of this State or any other State or the United States. The defendant, David Michael Barnett, in the County of Tarrant and State of Texas, on or about the 2nd day of May, 1980, did then and there intentionally cause bodily injury to R. W. Panke, by kicking him with his feet, Against the Peace and Dignity of the State.

WHEREFORE, your petitioner prays this Honorable Court order and direct the District Clerk to forthwith issue an alias capias herein directing that the Defendant be arrested and brought before this Honorable Court to show cause, if any he has, why the Judgment probating the sentence entered herein should not be set aside and said probation revoked and why said sentence should not be imposed and put into execution; that the Court further direct said District Clerk to serve upon said Defendant, as soon as possible, a true copy of this petition; and for such other orders as the Court may direct.

Respectfully submitted,

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

BY: Michael Wade
Assistant Criminal District Attorney

DATE: 7-7-80

ALIAS CAPIAS ORDERED: Randell C Riley, JUDGE
CRIMINAL DISTRICT COURT NUMBER THREE, TARRANT COUNTY, TEXAS

FILED
CRIMINAL DISTRICT COURT No. 3
TARRANT COUNTY, TEXAS
JUL 8 1980
J. W. BOORMAN
DISTRICT CLERK